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No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST CO. and CITICORP,
Petitioners,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
and
Respondents,

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT AND BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE U.S. CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. § 1842(d)(1), which prohibits all interstate bank acquisitions unless "specifically authorized by the statute laws of the State in which such bank is located," and which was intended to permit each state's policy to determine the degree to which it would permit such acquisitions, authorizes states to permit interstate acquisitions of banks located within their borders only by bank holding companies located in a geographically limited number of other states.

2. Whether separately enacted Massachusetts and Connecticut statutes, each of which authorizes acquisitions of their within-state banks only by banks or bank holding companies located in other New England states that permit Massachusetts or Connecticut banks, respectively, to acquire banks within their borders, violate the Commerce Clause, art. I, § 8, cl. 3, or the Compact Clause, art. I, § 10, cl. 3, of the Constitution.

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INTERESTS OF AMICI

The amici organizations' members include state and local government officials throughout the United States. Amici and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

States play a unique and significant role in bank regulation. Concurrent with extensive federal regulation of national banks, Congress long ago recognized the desirability of permitting states to exercise powers of exclusion that would ordinarily be denied them under the Commerce Clause. Accordingly, the Douglas Amendment to the Bank Holding Company Act prohibits the Federal Reserve Board from approving interstate bank acquisitions, unless specifically authorized by the statutes of the state in which the bank to be acquired is located. Thus, Congress imposed an absolute restriction on interstate banking, leaving the states discretion to determine whether, and to what extent, to remove this federal barrier to interstate commerce.

The state statutes directly at issue here, those of Massachusetts and Connecticut, represent two of many choices that states have made in implementing the authority conferred upon them by the Douglas Amendment. Under the terms of these statutes, the federal bar on interstate acquisitions is lifted as to bank holding companies located in other New England States which themselves permit Massachusetts or Connecticut banks, respectively, to acquire banks within their states. While amici believe that resolution in favor of the states of both the Commerce Clause and Compact Clause issues is compelled by the Douglas Amendment, their interests in this matter are not confined to the somewhat unique area of interstate bank acquisitions.

Petitioners' arguments that these statutes are prohibited as an unapproved "Compact" would substantially restrict state power and authority in other areas as well.

Reciprocal state legislation on a multiplicity of issues exists. Moreover, states presently engage in a wide variety of mutually beneficial arrangements, agreements and understandings, with sister states to achieve a range of economic and cultural goals. Much of this interstate cooperative activity has been undertaken without explicit congressional consent, consistent with the decision in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978). Petitioners' effort here to undo *Multistate* and persuade this Court that the Massachusetts and Connecticut statutes are an unconstitutional "Compact" or "Agreement," could implicate a far broader range of cooperative state activity.

Thus, the legal issues presented by this case are of importance to all state governments. Amici accordingly submit this brief to assist the Court in its resolution of the Compact Clause issue.

STATEMENT OF THE CASE

The Bank Holding Company Act ("BHCA")[1] was enacted "to prevent the concentration of banking resources in the hands of a few financial giants [and] to implement a congressional policy against control of banking and nonbanking enterprises by a single business entity." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 46 (1980). The provision that lies at the heart of the instant case represents a compromise between two conflicting approaches to the control of interstate bank acquisitions, both designed to promote these fundamental goals.

The Douglas Amendment prohibits the Federal Reserve Board from approving a proposed out-of-state bank acquisition unless "specifically authorized by the statute laws of the State in which such bank is located."[2] The House Bill from which the Douglas Amendment emerged contained an absolute prohibition on interstate acquisi-

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[1] 12 U.S.C. §§ 1841 *et seq.*

[2] 12 U.S.C. § 1842(d)(1).

tions by bank holding companies.[3] As reported out of committee, the Senate version would have permitted interstate acquisitions subject only to the oversight of the Federal Reserve Board.[4] As Senator Douglas explained, the amendment that bears his name establishes a federal ban on interstate acquisitions but confers upon states regulatory power to permit such acquisitions "to the degree" the states see fit.[5] The only express constraint the amendment places on the free exercise of state power is its requirement that the state statute authorize the acquisition "by language to that effect and not merely by implication."[6]

Since 1956, states have exercised their authority over interstate bank acquisitions in a variety of ways that creatively respond to local policy concerns. In 1972, Iowa enacted legislation that permitted acquisition of Iowa banks by a single out-of-state holding company;[7] both the Federal Reserve Board and the D.C. Circuit approved this legislation as lying within the state's Douglas Amendment authority to promote "state policy" and "choose selectively" among potential out-of-state holding company entrants.[8] Maine—an erstwhile member of the so-called "New England Compact" Petitioners decry—adopted a statute that imposes very few restrictions on the acquisition of banks by out-of-state holding companies.[9] Other states lifted the federal bar to a degree but also retained

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[3] H.R. Rep. No. 609, 84th Cong., 1st Sess. 1-2, 5-7 (1955).

[4] S. Rep. No. 1095, Pt. 1, 84th Cong., 1st Sess. 10-11 (1955).

[5] 102 Cong. Rec. 6858 (1956).

[6] 12 U.S.C. § 1842(d)(1).

[7] *See* Iowa Code Ann. § 524.1805 (West Supp. 1984-85).

[8] *See Northwest Bancorporation*, 38 Fed. Reg. 21530, 21531-32 (1973), *aff'd, Iowa Independent Bankers v. Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975).

[9] Me. Rev. Stat. Ann. tit. 9-B, § 1013 (West Supp. 1984-85) (minimum capital requirements). Citicorp has established a full service bank in Maine pursuant to this provision.

certain limitations to advance local concerns.[10] New York, for example, permits only those holding companies from states with reciprocal laws to acquire local banks.[11] Alaska permits out-of-state acquisition of only those banks existing on a certain date.[12] Two states authorized interstate acquisitions only of failing banks.[13] Eight states, not including Connecticut and Massachusetts, enacted statutes authorizing bank holding companies from a multi-state region to acquire local banks.[14] And many states, by not enacting any legislation in this area, have chosen to retain the absolute federal bar on out-of-state bank acquisitions.[15]

The pattern of experimentation established throughout the country is reflected in New England, whose six states

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[10] *See* Fla. Stat. Ann. § 658.29(3)(d) (1984) (effective 1976) (authorizing entry of three out-of-state holding companies); Del. Code Ann. tit. 5, § 803 (Supp. 1984) (authorizing entry of out-of-state holding companies to establish financial center with stated assets and employees); Md. Fin. Inst. Code Ann. §§ 5-906-908 (Supp. 1984) (same).

[11] N.Y. Banking Law § 142-b (McKinney Supp. 1983).

[12] Alaska Stat. § 06.05.235 (1982).

[13] Or. Rev. Stat. § 716.920(8) (1983); Wash. Rev. Code Ann. § 30.04.230 (Supp. 1985).

[14] *See* Fla. Stat. Ann. §§ 658.295 *et seq.* (1984) (effective July 1, 1985); Ga. Code §§ 7-1-620 *et seq.* (Michie Supp. 1984); Ky. Rev. Stat. §§ 287.900 *et seq.* (Michie Supp. 1984); N.C. Gen. Stat. §§ 53-209 *et seq.* (Supp. 1984); R.I. Gen. Laws §§ 19-30-1, 19-30-2 (1984); S.C. Code Ann. tit. 34, ch. 24, 25 (Law Co-op. 1984); Utah Code Ann. §§ 7-1-102, 7-1-702 (Supp. 1984); 1985 Va. Acts (to be codified at Va. Code Ann. §§ 6.1-381 *et seq.*) (effective July 31, 1985). *See also* note 18 *infra*.

[15] Petitioner Citicorp has lobbied extensively in Florida, Maryland and elsewhere for so-called national reciprocal legislation that would authorize out-of-state banks from any jurisdiction with a similar statute to acquire the assets of local banks. Failing this, Citicorp has supported provisions that trigger the elimination of barriers at some future date, and those that authorize toe-holds in certain states that will ripen in time into full service banks. *See* R. Sczudlo, *Developments in the Area of State Regulation*, reprinted in, *Bank Acquisitions and Takeovers: 1984* 41, 67-76 (Practicing Law Institute 1984).

have adopted five responses to the problem of interstate banking. Vermont and New Hampshire have both rejected any interstate banking legislation, thus choosing to preserve the absolute bar on out-of-state bank acquisitions established in the Douglas Amendment. Maine, by contrast, has enacted provisions that liberally authorize out-of-state banks to acquire full service banks.

The three remaining states have enacted statutes between these two extremes. Massachusetts, Connecticut and Rhode Island each permit bank holding companies from New England states with reciprocal legislation to acquire banks within their borders.[16] None of these state statutes require any other state to adopt the geographic restriction that excludes petitioners from acquisitions in these states. Because these states chose to lift the bar of the Douglas Amendment only for bank holding companies located within New England, however, the federal prohibition on interstate expansion and concentration continues to apply outside that region.

SUMMARY OF ARGUMENT

I. An agreement among states requires Congress' consent under the Compact Clause only when it tends to increase the political power of those states in such a way as to encroach upon the just supremacy of the federal government. *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978). Because this standard invalidates only those agreements that "impermissibly enhance state power at the expense of federal supremacy," *id.* at 472, the Douglas Amendment's "renunciation of federal interest" is dispositive. There, Congress expressly authorized states to determine whether to permit interstate bank acquisitions and, for purposes of this case,

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[16] *See* Mass. Gen. Laws Ann. ch. 167A § 2 (West Supp. 1984); Conn. Act No. 83-441 (1983) (to be codified at Conn. Gen. Stat. Ann. § 36 Pts. 552-57); R.I. Gen. Laws §§ 19-30-1, 19-30-2 (Supp. 1984). These state statutes are by no means identical; Rhode Island's statute, for example, includes a provision, effective July 1986, that will permit bank holding companies from any state with reciprocal laws to acquire in-state banks.

struck "the proper balance between federal and state power." *Id.* at 471. The Connecticut and Massachusetts reciprocal bank statutes neither increase the political power of the states nor otherwise encroach on the just supremacy of the federal government. Accordingly, they do not violate the Compact Clause.

A. Before applying the *Multistate* test, a reviewing court must determine whether the states have reached agreement on the challenged issue. In this case, neither the Connecticut nor the Massachusetts statute conditions reciprocity with other New England states on those states' adopting similar geographic limitations. Thus, the geographic exclusion of which Petitioners complain is not embodied in the reciprocity provisions that form the basis for their Compact Clause challenge, and further Compact Clause scrutiny is not appropriate.

B. Enactment of these statutes by the separate legislatures of Connecticut and Massachusetts in no way increases the political power of either state. While boundary agreements or agreements creating multistate agencies could threaten to enhance state political power at the expense of federal supremacy, these reciprocal statutes present no such threat. They do not affect either state's voting power in the Congress, nor create any multistate agency exercising sovereign powers. They do not confer otherwise lacking sovereign powers upon a state or states, nor do they compel other New England states to adopt similar geographic restrictions. Given the conclusion that the Multistate Tax Commission did not impermissibly alter the political balance, these statutes *a fortiori* pose no such risk.

Petitioners' argument that the Compact Clause is offended by agreements that may economically disadvantage other states is neither factually apposite nor consistent with the reasoning of *Multistate*. As *Multistate* makes clear, states may freely confer mutual economic benefits on one another under the Compact Clause so long as they do not offend the Commerce Clause or an-

other constitutional area of federal supremacy. Indeed, many agreements and other forms of state cooperation promote regional economic development and interests, and have been neither approved by Congress, nor questioned by the courts. Such arrangements pose no threat to any sister state's sovereignty and thus cannot violate the Compact Clause.

C. Nor do these statutes encroach on the "just supremacy" of the United States, in view of the Douglas Amendment's renunciation of a federal interest in regulating interstate bank acquisitions. Plainly the Commerce Clause is not offended by the two state statutes. Congress has unquestioned power to restrict the flow of interstate commerce. In adopting the Douglas Amendment, Congress interposed just such a federal restriction on out-of-state bank acquisitions and, at the same time, authorized the states to determine the degree to which such acquisitions of local banks would be permitted. This renunciation of a federal interest removes any objection founded on the Commerce Clause or Congress' regulation of banking, and, with it, any asserted encroachment on the "just supremacy" of the United States.

II. Petitioners err in contending that the Compact Clause requires Congress to consent "explicitly and with full knowledge" of the compact being approved. Although this case presents no occasion for addressing this question, this Court has consistently held that Congress may "consent . . . in advance . . . or by giving express or implied approval to an agreement the states have already joined." *Cuyler v. Adams*, 449 U.S. 433, 441 (1981). Sister states claiming prejudice from an exercise of state authority may seek redress from Congress at the time of injury, and are thus not prejudiced by advance or implicit congressional authorizations.

ARGUMENT

I. THE CONNECTICUT AND MASSACHUSETTS STATUTES DO NOT IMPINGE ON THE JUST SUPREMACY OF THE NATIONAL GOVERNMENT AND DO NOT REQUIRE CONGRESSIONAL CONSENT UNDER THE COMPACT CLAUSE

The Compact Clause of the Constitution, art. I, § 10, cl. 3, provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power." Literally construed, the Compact Clause would invalidate a great variety of beneficial forms of state cooperation unless the states convinced a busy Congress to place its imprimatur on each arrangement. As a practical matter, the expense and inconvenience of obtaining such consent would preclude many beneficial cooperative state agreements.

At least since its decision in *Virginia v. Tennessee*, 148 U.S. 503 (1893),[17] this Court has recognized that the framers did not intend so unworkable a scheme. There, the Court limited the sweep of the requirement of Congressional consent

> to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.

Id. at 519. *New Hampshire v. Maine*, 426 U.S. 363, 369-70 (1976), and *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471 (1978), confirmed that *Virginia v. Tennessee* states the proper test for determining whether the absence of Congressional consent precludes state cooperation. The fundamental question is whether the challenged agreements "enhance state power at the expense of federal supremacy." 434 U.S. at 472.

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[17] Early suggestions to the same effect appear in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) and *Union B. R. Co. v. East Tennessee & G.R. Co.*, 14 Ga. 327, 339 (1853).

Petitioners' Compact Clause challenge to the Connecticut and Massachusetts statutes confuses the reciprocity provisions with the geographic limitations to conjure an agreement that does not, in fact, exist. Petitioners ignore the decisive effect of the Douglas Amendment in assessing the nature of the federal interest in interstate banking acquisitions, and can show no political encroachments on federal interests or state sovereignty that the "just supremacy" of the United States protects. Accordingly, their constitutional challenge must fail.

A. There Is No Agreement Between Massachusetts And Connecticut To Exclude States Outside New England

Petitioners disparagingly refer to the Connecticut and Massachusetts statutes as a "New England Compact," and then purport to apply this Court's Compact Clause analysis to determine whether Congressional approval should have been obtained. Although this Court's decision in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 471 (1978), certainly sanctions Compact Clause scrutiny of informal, as well as formal, interstate agreements, it does not require such scrutiny in the absence of at least some agreement between compacting states.[18]

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[18] While the *Multistate* Court stated that "agreements effected through reciprocal legislation may present opportunities for enhancement of state power," 434 U.S. at 470, it did not state that reciprocal legislation of itself necessarily imports an agreement. Indeed, in *Bode v. Barrett*, 344 U.S. 583, 586 (1953), the Court stated that "reciprocal arrangement[s] between states [have] never been thought to violate the Compact Clause;" Justice Frankfurter, who dissented on the grounds that the legislation in question burdened interstate commerce, did not question or take issue at all with the majority's brief disposition of the Compact Clause challenge, notwithstanding his interest and familiarity with such issues. 344 U.S. at 586 (Frankfurter, J., dissenting). *See also West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951) (Frankfurter, J.) (recognizing that "growing interdependence of regional interests, calling for regional adjustments," has brought extensive use of compacts).

The reciprocal character of the Massachusetts and Connecticut legislation provides the centerpiece of Petitioners' claim that such an agreement was effected. A careful examination of the statutes, however, reveals that their reciprocity provisions in no way condition entry of out-of-state bank holding companies on the adoption by such other states of similar geographical limitations. Neither Massachusetts nor Connecticut requires the other, or any New England state, to exclude non-New England states in order to benefit from the reciprocity provisions. All that the reciprocity conditions require is that states whose banks want to acquire a Connecticut bank, for example, permit Connecticut banks to make acquisitions within their territory.[19] Thus, nothing in the challenged statutes prevents holding companies located in Maine from acquiring banks in both Connecticut or Massachusetts, despite Maine's failure to adopt a geographic restriction. *Cf. Multistate*, 434 U.S. at 492 (White, J., dissenting) (compact there required member states to provide certain tax options).

In sum, each of the New England states remains free to assess the competitive character of its own local banking industry and to permit or deny out-of-state entry under the Douglas Amendment to the degree it sees fit. Maine and Rhode Island have adopted statutes strikingly different from those under review; New Hampshire and Vermont have chosen to leave intact the federal bar on out-of-state entry. Massachusetts and Connecticut, moreover, each retains authority to reconsider its interstate banking statute and amend or repeal it if local conditions change.[20]

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[19] *See* Mass. Gen. Laws Ann. ch. 167 § 2 (West Supp. 1984); Conn. Act. No. 83-441 (1983) (to be codified at Conn. Gen. Stat. Ann. § 36 Pts. 552-57).

[20] Reciprocal legislation in general poses less potential for intrusion on federal interests than a formal compact or agreement subscribed to as such by the states, since it may be modified by participants at any time. *Cf. Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823) ("compact or agreement" under art. I, sec. 10, cl. 3 is

In such a dynamic legislative environment, Petitioners cannot well argue that the reciprocal character of the challenged statutes causes them any injury. The New England states have not monolithically enacted statutes with a purely regional focus nor do the challenged statutes require such a focus in other states. Rather, it was the independent decisions of Connecticut and Massachusetts legislators that their own banking industry would be well served by some, but not unlimited, interstate competition that Petitioners challenge in this Court.[21] Petitioners' legal injury, if any, does not arise from the reciprocity provisions. While it is thus doubtful that any further analysis of the statutes under the Compact Clause is necessary, application of the *Multistate Tax Commission* standard confirms that congressional consent to these state laws is not required.

B. The State Laws At Issue Here Do Not Increase The Political Power Of Massachusetts And Connecticut Or Impair Sovereignty Of Other States

Enactment of legislation regulating interstate bank acquisitions by the separate legislatures of Connecticut and Massachusetts will in no way "increase and build up the political influence of the contracting states," *Virginia v. Tennessee*, 148 U.S. at 517-18, in derogation of the concept of Union embodied in the Compact Clause. As originally understood, the Compact Clause was aimed principally at requiring congressional consent to border compacts,[22] perhaps because they may affect the voting

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enforceable contract which the states are forbidden to impair); *Texas v. New Mexico*, 462 U.S. 554, 569 n.16 (1983) (states may only withdraw from compact in accordance with its terms).

[21] Indeed, any suggestion that there was an actual "agreement" to "boycott" New York is refuted by the legislative process itself, in which individual legislators of each state participated. *See also United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 478 (1978) (individual state's decision, though based on commission recommendation, no threat to other states' sovereignty).

[22] *See* F. Zimmerman & M. Wendell, *The Law and Use of Interstate Compacts* 22 (1976) [hereinafter cited as "Zimmerman &

power of the states in Congress and thus pose a threat of increased or altered political influence.[23] In modern times, the most dramatic new use of congressionally-approved compacts has been to establish multistate government agencies, exercising sovereign powers over, *e.g.*, the Port of New York,[24] or the Delaware River Basin.[25]

The economic regulation of interstate banking by Connecticut and Massachusetts will clearly not alter their voting power in Congress, nor otherwise affect the po-

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Wendell, *Law and Use*"]; Council of State Governments, *Interstate Compacts & Agencies* vi (1983) [hereinafter cited as "Council, *Interstate Compacts*"] (from 1783 to 1920, states entered into 36 compacts dealing predominantly with "common boundary line[s]"). *See also* F. Zimmerman & M. Wendell, *The Interstate Compact Since 1925* 3 (1951) [hereinafter cited as "Zimmerman & Wendell, *Compacts Since 1925*"]. One modern scholar suggests that the framers understood the terms "compact" and "agreement" to refer to dispositive transactions, such as border compacts, that resolve issues for all time and do not contemplate continuing performance. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 Mich. L. Rev. 63, 77 (1965) [hereinafter cited as "Engdahl"]. In *Multistate*, 434 U.S. 452, 459-64 & nn.10-14, the Court surveyed various interpretations of the original meaning, concluded that the passage of time had eroded any distinct meaning and proceeded to apply the test articulated in *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

[23] *See* Zimmerman & Wendell, *Law and Use*, *supra* note 22, at 23; *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

[24] The New York-New Jersey Port Authority Compact, 65 Stat. 650 (1921), a landmark in the history of compact evolution, established a commission to develop and construct comprehensive transportation and terminal facilities and to promote commerce and trade. The Port Authority today employs 8000 workers. *See* Council, *Interstate Compacts*, *supra* note 22, at 2. Its success has spawned similar efforts in such interstate Metropolitan areas as St. Louis and Philadelphia. *Id.* at 17.

[25] The Delaware River Basin Compact, 75 Stat. 688 (1961), established a commission that serves as a regional multipurpose water resources agency. Notably, the United States joined as a party to the compact. *See* Grad, *Federal-State Compact: A New Experiment In Co-operative Federalism*, 63 Colum. L. Rev. 825 (1963).

litical power of those two states.[26] Neither state has relinquished or delegated its police or other sovereign powers; no interstate agency or commission has been created. Neither state conditions reciprocity on other states' having geographic limitations, and each state retains power to supervise its regulatory initiative and define the scope of permissible bank acquisitions within its own borders.

On such a record, there is no basis for finding a prohibited enhancement of state political power that " ' project[s] a new presence onto the federal system [or] alter[s] any state's basic sphere of authority.' " [27] Unable to make such a showing, Petitioners claim that the statutes offend the sovereignty of non-New England states and thus violate the Compact Clause. The difficulties with this formulation are legion.

To begin with, the exclusion of sister states of which Petitioners complain was established by the Douglas Amendment, which erected a federal barrier preventing bank holding companies from acquiring banks in other states. Against the background of this *federal* prohibition on interstate acquisitions, the challenged legislation operates to enhance competition within New England.[28]

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[26] *Cf. Multistate*, 434 U.S. at 479 n.33 (enhanced capacity to lobby Congress does not encroach on or interfere with just supremacy of the United States).

[27] *Multistate*, 434 U.S. at 470 n.21 (quoting Prof. Tribe). *Cf. Salorio v. Glaser*, 414 A.2d 943, 957 (N.J.), *cert. denied*, 449 U.S. 804 (1980). As in *Multistate*, the statutes as issue do "not purport to authorize the member States to exercise any powers they could not exercise in its absence." *Id.* at 473. The case for finding a prohibited compact is, in fact, far less compelling than in *Multistate*, where an interstate commission sought to apply uniform tax standards to all businesses operating in interstate commerce. Indeed, apart from boundary resolutions and actions which, through the creation of new government entities or otherwise, reallocate or delegate powers of governance, state agreements are unlikely to "build up" or enhance state political power *"quoad* the National Government." 434 U.S. at 473.

[28] Indeed, the Federal Reserve Board found evidence that the proposed merger between BNE of Massachusetts and CBT of Con-

Petitioners' fundamental complaint, it must be seen, is with the policy of the Douglas Amendment, and not with the regional lifting of its bar adopted by Massachusetts and Connecticut.[29]

Apart from its mistaken premise that it is the challenged state laws that "derange" state relations, Petitioners' claim of "affront" to sister states is inconsistent with the reasoning in *Multistate*.[30] The appellants in

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necticut would potentially enhance consumer welfare in New England by creating a financial institution with the resources to compete with large interstate financial conglomerates in offering "nonbanking" financial services. Pet. App. A44. The argument that the regional restriction burdens commerce by limiting the capital market for bank shares similarly ignores the even greater restriction imposed by federal law. *Cf.* Bolger Trust Am. Br. at 3-4.

[29] Under the Douglas Amendment, every state is free to permit entry by out-of-state banks, subject to limitations in keeping with the interests of its citizenry and health of its banking industry. New York has itself done so, enacting a reciprocity provision that does not remove the federal bar for New Hampshire or Vermont bank holding companies that might seek to acquire New York banks, small or large. *Cf.* N.Y. Am. Br. at 3.

[30] Petitioners err in relying on dicta from *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1855) to support their theory that the Compact Clause requires an inquiry—separate from the Commerce Clause—into possible disadvantaging of economic rights and interests of other states. First, *Florida v. Georgia* concerned the right of the United States to intervene in a boundary dispute litigation. In this context, the Court's reference to the United States as the representative of the interests of the other states simply restates the modern formulation of the function of the Compact Clause; it has been consistently recognized that boundary adjustments, since they change the character of the sovereign participants in the Republic, affect the sovereign political interests of all. Second, as the other case cited by Petitioners suggests, any "state interests" viewed as protected under the Compact Clause must be viewed as the states' interests *in the federal union. See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (Compact Clause guards against "the derangement of [the states'] *federal* relations with the other states of the Union.") (emphasis added). *Cf. People ex rel. Barlow v. Curtis*, 50 N.Y. 321, 324 (1872) ("The highest interests of the States are promoted by yielding to the general government and protecting it in the enjoyment of unquestioned control over the subjects confided to it by the Con-

Multistate claimed that the Tax Compact exerted "undue pressure" on nonmember States "in violation of their 'sovereign right[s] . . . .'" 434 U.S. at 477. Finding any such pressure to arise "independent of the Compact," the Court went on to hold that, even if economic pressure arose from the Compact, it would *not* be "an affront to the sovereignty of the nonmember States," or implicate "our federal structure," "[*u*]*nless* that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause. . . ." 434 U.S. at 477-78 (emphasis added). As discussed below, the statutes here do not violate the Commerce Clause, and no claim has been made under the Privileges and Immunities Clause.[31]

Petitioners' argument that economically beneficial but geographically limited reciprocal statutes "affront" other states' sovereignty so as to require Congress' consent would, by focussing analysis on alleged injury to other states rather than encroachment on federal interests, threaten many established forms of state cooperation. Such an approach to the Compact Clause, unless bounded by the principles of Commerce Clause analysis, would disrupt many accepted and beneficial forms of state cooperation.

Compacts, like reciprocity statutes, are generally entered into for the mutual improvement and benefit of the contracting states.[32] Without reference to the interests

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stitution."). *See also Multistate*, 434 U.S. at 467 (interpretations of the Compact Clause preceding *Virginia v. Tennessee* are such a "puzzlement" that they provided little guidance). Petitioners offer no persuasive basis to abandon the *Multistate* analysis.

[31] The Compact Clause, independent of other constitutional constraints, protects only against aggrandizement of state political power at the expense of the federal government, which has not occurred here. *Compare* 434 U.S. at 479 n.33 *with id.* at 494 (White, J., dissenting).

[32] The statutes at issue here, though not an agreement at all, were plainly enacted by Massachusetts and Connecticut for the benefit of their respective citizens. And the reasonableness of the geographic restriction for each State's first experiment in 30 years in permitting interstate acquisitions is suggested by Congress' own

of non-compacting states, this Court has approved explicit agreements designed "to promote the peace, good neighborhood, and welfare of both [compacting] states, and facilitate intercourse between their citizens." *Wharton v. Wise*, 153 U.S. 155, 167 (1894). Such arrangements, by their very nature, tend to establish special relationships between the party states, but do not run afoul of the Compact Clause on that basis.[33]

A wide variety of uniform laws, reciprocal agreements, and regional promotional arrangements might be subject to attack under Petitioners' view that the Compact Clause will prohibit, absent congressional consent, what mutual economic advantages to the compacting parties the Commerce Clause permits. Uniform state laws on a variety of subjects exist, and often confer reciprocal rights on the enacting parties.[34] These statutes have

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use of the New England states as a laboratory for its experiment with NOW accounts. *See Otero Sav. & Loan Ass'n v. Federal Reserve Bd.*, 665 F.2d 279, 283 (10th Cir. 1981).

[33] Justice Frankfurter articulated a classic rejoinder to the claim that conferring such a joint benefit violates the Compact Clause:

> an argument that benefiting other States is beyond the power of a State would completely disregard the inherent implications of our federalism within whose framework our organic society lives and moves and has its being—the abundant and complicated interrelationship between national authority and the States, and between the States *inter sese*. To yield to this argument would foreclose to the States virtually all arrangements which increase comity among the States.

New York v. O'Neill, 359 U.S. 1, 9, (1959) (citation omitted). *See also Bode v. Barrett*, 344 U.S. 583, 586 (1953); *St. Louis & S.F.R. Co. v. James*, 161 U.S. 545, 562 (1836).

[34] The National Conference of Commissioners on Uniform State Laws, founded in 1896, produces up to ten new proposed uniform laws every two years. *See generally* Council of State Governments, *The Book of The States: 1982-83*, 84-85. Among the most popular as of September 1, 1981 were the Uniform Anatomical Gift Act (50 jurisdictions), the Uniform Commercial Code (50 jurisdictions), the Uniform Declaratory Judgment Act (43 jurisdictions), the Uniform Limited Partnership Act (50 jurisdictions), and the Uniform Criminal Extradition Act (49 jurisdictions). *Id.* at 86-88.

always been upheld when challenged under the Compact Clause,[35] yet Petitioners' approach would permit attack if non-participating states claim any disadvantage from their enactment by others. States have adopted a variety of other multistate and bi-lateral arrangements, designed to make the most efficient use of existing institutions.[36] Such arrangements necessarily exclude other states but have never been understood as subject to Compact Clause challenge on that basis.[37]

Moreover, states across the country have in recent years recognized that there are "regional interests, regional cultures and regional interdependencies" that, without threat to the interests of other states or the

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[35] *See Ivey v. Ayers*, 301 S.W. 2d 790 (Mo. 1957) (Uniform Support of Dependents Law); *Landes v. Landes*, 1 N.Y. 2d 358, 135 N.E. 2d 562 (1956) (same). *Gulley v. Apple*, 210 S.W. 2d 514 (Ark. 1948) (Uniform Act for Out-of-State Parole Supervision); *Ex Parte Tenner*, 20 Cal. 2d 670, 128 P.2d 338 (1942) (same). *See also General Expressways, Inc. v. Iowa Reciprocity Board*, 163 N.W.2d 413 (Iowa 1968) (Uniform Vehicle Registration Proration and Reciprocity Compact).

[36] *See, e.g.*, Minnesota-Wisconsin Student Reciprocity Agreement, Wis. Stat. Ann. § 39.47 (West Supp. 1984-85) (reciprocal waiver of nonresident tuition). *See also* Zimmerman & Wendell, *Interstate Compacts, reprinted in* Council of State Governments, *The Books of the States: 1976-1977* 573 (describing efforts of New England Board of Higher Education to coordinate joint legislative approval of regional college of veterinary medicine, open to all students from region with advantageous tuition arrangement). Other regional agreements provide for the mutual availability of health services and facilities, radiological treatment facilities and welfare services and benefits, all without congressional consent. *See* notes 38, 39 *infra*.

[37] *See, e.g., Opinion of the Justices*, 344 Mass. 770, 184 N.E. 2d 353 (1962) (proposed compact among New England states providing for the cooperative use of the region's correctional institutions would not require congressional approval under *Virginia v. Tennessee*). *See also Breest v. Moran*, 571 F. Supp. 343, 345 (D.R.I. 1983). *Cf. St. Louis & S.F.R. Co. v. James*, 161 U.S. 545, 562 (1836) (reciprocal bi-state regulation of railway, without congressional consent, does not violate Compact Clause "in absence of inhibitory legislation by Congress").

supremacy of the nation, justify "regional solutions." Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 708 (1925). Many have accordingly entered into regional development agreements, whose express purpose is to enhance the economic and resource development of member states.[38] Many of these have not received congressional consent.[39]

Under Petitioners' proposed focus on the economic interests of nonparticipating states, such agreements as the Southern Growth Policies Agreement, the Southern Regional Education Compact, and the New England Radiological Health Protection Compact, none of which has received congressional consent, and a wide variety of less formal, mutually beneficial arrangements between states in different regions would fall under a cloud of constitutional suspicion. But under *Multistate*, alleged affronts to state economic interests are measured against the Commerce Clause, and are not viewed as impairments of state sovereignty implicating the fundamental

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[38] In adopting the Southern Growth Policies Agreement to foster economic growth through cooperative planning and development, for example, the 12 Southern member states found that they shared "a sense of community based on common social, cultural and economic needs and fostered by a regional tradition." Va. Code Ann. §§ 2.1-339.1 (1979 Repl.) (effective 1971). Other regions of the country, including the West and New England, have entered into compacts that pledge cooperation on subjects as diverse as nuclear energy, health, and education. *See* Council, *Interstate Compacts*, *supra* note 22, at 11, 13 & 15 (describing, *inter alia*, Southern Regional Education Compact, New England Radiological Health Protection Compact, Western Interstate Energy Compact). *See also* note 39 *infra*.

[39] A partial list of regionally exclusive compacts that have not received congressional consent includes the following: Southern Regional Education Compact, Md. Educ. Code Ann. §§ 25-201-25-205 (1978); New England Health Services and Facilities Compact, Me. Rev. Stat. Ann. tit. 22 §§ 691-99 (1980); New England Radiological Health Protection Compact, Me. Rev. Stat. Ann. tit. 22, §§ 751-59 (1980); Southern Growth Policies Agreement, Va. Code Ann. §§ 2.1-339.1 *et seq.* (1979 Repl.).

concern of the Compact Clause: to protect against a build-up of state political power "that threatens the Supremacy of the Federal Government." *New Hampshire v. Maine*, 426 U.S. at 370.

C. These State Laws Do Not Encroach Upon The Just Supremacy Of The United States

As presently understood, the Compact Clause and its requirement of congressional consent apply only to " 'the formation of any combination tending to the increase of political power in the states, *which may encroach upon or interfere with the just supremacy of the United States.*' " *Multistate*, 434 U.S. at 468, (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). This test validates compacts and other forms of state cooperation that "promote the . . . welfare of both States," *Wharton v. Wise*, 153 U.S. at 166, and do not " 'infringe[] the rights of the national government.' " *Virginia v. Tennessee*, 148 U.S. at 519 (quoting II J. Story, *Commentaries on the Constitution of the United States* § 1403 (Cooley ed. 1873)).

The Douglas Amendment decisively defines the scope of the "rights of the national government" in a way that defeats Petitioners' Compact Clause challenge to the Connecticut and Massachusetts statutes. The Amendment erects a federal barrier to interstate bank acquisitions, and gives states authority to permit such acquisitions to the degree they see fit. As the Court below concluded, such a grant of authority renders the Connecticut and Massachusetts statutes "invulnerable" to Commerce Clause challenge. The Douglas Amendment, moreover, effects a renunciation of federal interest in regulating this aspect of interstate bank acquisitions and thus precludes any possible encroachment on the "just supremacy" of other federal regulatory interests.

1. *The Massachusetts and Connecticut Statutes Do Not Violate the Commerce Clause*

This Court has long recognized, and Petitioners do not deny, that Congress may, in the exercise of its authority

over interstate commerce, confer upon states power they would otherwise lack to regulate an area of interstate commerce. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423-24 (1946). When Congress authorizes such state regulation with the requisite degree of clarity, "any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 653 (1981). *See Prudential Insurance Co. v. Benjamin, supra*, 328 U.S. at 429, 431.

As both the reviewing Court below and the federal agency charged with applying its provisions have held, the Douglas Amendment grants states control over the degree to which out-of-state bank holding companies may acquire local banks. In order "to prevent the concentration of banking resources in the hands of a few financial giants," *Lewis v. BT Investment Managers*, 447 U.S. at 46, the Douglas Amendment divides the country into fifty banking regions, defined by the boundaries of the states, and prohibits acquisitions across state lines

> unless [such acquisition] is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

12 U.S.C. § 1842(d)(1). Congress has thus empowered each state to control the extent to which out-of-state bank holding companies may acquire banks within the state.

It has been argued, however, that despite this unrestricted authorization the states are disabled from adopting innovative approaches and must choose between retaining the blanket federal prohibition on interstate banking or permitting interstate banking on the broadest national scale. The plain language of the statute, however, supports the view that the congressional grant of authority vested the states with power to deal creatively, and on a geographically limited basis, with interstate

banking acquisitions.[40] Review of the legislative history of the Douglas Amendment rebuts any all-or-nothing interpretation.

In support of his amendment, Senator Douglas traced the history of increasing financial concentration in this country and highlighted the central role that bank holding companies played in such concentration. *See* 102 Cong. Rec. 6850, 6857-60 (1956). In particular, Douglas called attention to the use of bank holding companies as a device to skirt limitations states had imposed on branch banking. In explaining the limitations he proposed on the powers of bank holding companies to make interstate acquisitions, Senator Douglas relied on the McFadden Act, 12 U.S.C. § 36(c),[41] which had made national banks chartered by the Comptroller of the Currency subject to the same restrictions on branching that each individual state applied to state-chartered banks within its borders.

At the time of the Douglas amendment, the states had developed a variety of innovative branch banking laws responsive to the policy imperatives of their particular regions.[42] Senator Douglas was aware of this variation among state laws and called it to the attention of his

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[40] Indeed, by requiring states to act by "statute," Congress placed control over the decision to permit interstate mergers, not in the offices of state banking commissioners, but in the houses of the state legislatures. This grant of authority directly to state legislatures suggests that Congress anticipated that these laboratories of inventiveness would bring their creative powers to bear on the problem of interstate banking. *Cf. New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1933) (Brandeis, J., dissenting).

[41] 102 Cong. Rec. 6858 (1956).

[42] As of the approximate date of the Douglas Amendment, some seventeen states permitted statewide branch banking; thirteen flatly prohibited it; and sixteen authorized branching within limited areas. *See* Stokes, *Public Convenience and Advantage in Applications for New Banks and Branches*, 74 Banking L. J. 921, 942 (1957) (compiling analysis of state laws).

colleagues.[43] Douglas pointed out that branch banks had grown rapidly in the years prior to the McFadden Act "and to check their growth various states passed laws limiting, and in some cases preventing it, as in the case of Illinois." 102 Cong. Rec. 6858 (1956). National banks sought power to establish branches freely but, as Douglas emphasized, the McFadden Act authorized such banks to open branches "only *to the degree* permitted by State law and State authorities." *Id.* (emphasis added) (referring to McFadden Act).

In describing the scope of state authority to permit interstate acquisitions by bank holding companies under his amendment, Senator Douglas chose the same all-encompassing phrase: the amendment "will permit out-of-State holding companies to acquire banks in other States only *to the degree* that State laws expressly permit them." *Id.* (emphasis added). Senator Douglas thus explicitly contemplated that state regulation of interstate acquisitions would range from statutes banning interstate acquisitions to those freely permitting such acquisitions and would include intermediate provisions permitting interstate acquisitions "to the degree" consistent with local policy concerns.[44] Over objections by Senators concerned with "discrimination by one State against

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[43] *See, e.g.*, 102 Cong. Rec. 6858 (1956) (Sen. Douglas) (describing New York's plan; State divided into 10 zones, with branch banking permitted within each region; bank-holding companies evaded competitive purpose of zones by acquiring banks in all zones).

[44] *See also id.* at 6860 ("the amendment would leave the way open for States to make explicit provisions for such purchases and acquisition if they so decided."); *id.* at 6859 ("explicit permission" requirement) (Douglas). Other sponsors plainly shared Senator Douglas's understanding that the proposed amendment would authorize varying state legislative responses. Senator Payne argued that

> the control of expansion of bank holding companies across state lines into state banks *is a matter of primary concern to the State governments* and is an area *best left to their discretion.*

Id. at 6862 (emphasis added).

another" [45] and with Congress' "requir[ing] discrimination in interstate commerce," [46] his amendment was adopted. In the face of this record, there can be little doubt that the Massachusetts and Connecticut statutes are within the authority granted by Congress and thus "invulnerable to Commerce Clause challenge." [47]

2. *The Douglas Amendment's Renunciation of a Federal Interest Alters the Balance of State and Federal Power Over Interstate Bank Acquisitions and Precludes Finding An Encroachment on Federal Supremacy*

As shown above, each of these statutes is authorized by the Douglas Amendment. The fact that two states enacted the same regional restriction in no way constitutes an encroachment on federal supremacy.

This Court has been understandably "reluctant to strike down newly emerging forms of interstate cooperation." *Multistate*, 434 U.S. at 465. Indeed, only where a state agreed with a foreign power to an extradition in derogation of exclusive federal authority has this Court found

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[45] *Id.* at 6861 (Remarks of Sen. Bricker).

[46] *Id.* at 6860 (Remarks of Sen. Bennett).

[47] Given the choice between the national reciprocal state legislation that petitioner Citicorp has lobbied for, *see* note 15, *supra*, or the geographically limited lifting of the ban on interstate acquisitions that Connecticut and Massachusetts have chosen, there can be little doubt that Senator Douglas would favor the latter approach. In support of his amendment, he filled many columns of the Congressional Record with a well-documented concern to prevent both any "tendency toward monopolizing credit by driving out the small banks," and any "concentration [in] banking . . . power," 102 Cong. Rec. 6857, which, based on experience here and abroad, he thought would result if bank acquisitions and mergers were not halted. *Id.* at 6858-59. He made clear his goal of "a bank situation in which there are a large number of banks with no monopoly and with a dispersion of power," and rejected arguments by opponents that it would be unfair to competitors of existing large banks to preclude their expansion: "The present degree of concentration of control does not give everyone else a vested right to equivalent expansion." *Id.* at 6860.

a violation of the Compact Clause.[48] State cooperation on such matters of concurrent state and federal interest as the building of railroads or bridges, the improvement of levees and drainage of lands, has been sustained without Congress' consent.[49] Understood as stating the "proper balance between federal and state power," *id.* at 471, and informed by the distinction between areas in which federal control must be exclusive and those in which states remain competent to act, *Multistate's* analysis requires consent only to those forms of state cooperation that would encroach upon the exercise of federal powers.[50]

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[48] *See Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 574 (1840). *Holmes* is the only federal case of which amici are aware in which state action was arguably found to violate the Compact Clause. It is currently understood as recognizing that the preeminent federal power displaces state extradition agreements with foreign countries. *See Multistate*, 434 U.S. at 465 n.15; *see also United States v. Rauscher*, 119 U.S. 407, 414 (1886); *People ex rel. Barlow v. Curtis*, 50 N.Y. 321, 331 (1872).

[49] *See St. Louis & S.F. R. Co. v. James*, 161 U.S. 545, 562 (1896). (railroad); *Union Branch R. Co. v. East Tennessee & G. R. Co.*, 14 Ga. 327, 339 (1853) (railroad); *Dover v. Portsmouth Bridge*, 17 N.H. 200, 223 (1845) (bridges); *Fisher v. Steele*, 39 La. App. 447, 1 So. 882 (1887) (levees); *McHenry County v. Brady*, 37 N.D. 59, 70, 163 N.W. 540, 544 (1917) (upholding informal drainage agreement between North Dakota county and Canadian province).

[50] In analyzing reciprocal state regulation of a railroad that extended across state boundaries, this Court has noted:

> Such legislation on the part of two or more states is not, *in the absence of inhibitory legislation by Congress*, regarded as within the constitutional prohibition of agreements or compacts between states.

St. Louis & S.F.R. Co. v. James, 161 U.S. 545, 562 (1836) (emphasis added). The decision thus recognizes that the failure of Congress to exercise certain powers may leave states an arena of regulatory competence over matters that touch upon interstate commerce. Petitioners thus err in claiming that the court below improperly dismissed their Compact Clause challenge in reliance on congressional power "to remove the encroachment by appropriate legislation." *Northeast Bancorp., Inc. v. Board of Governors*, 740 F.2d 203, 209 (2d Cir. 1984). The court's analysis correctly

Petitioners' Compact Clause attack ignores the decisive effect of the Douglas Amendment in defining the strength and nature of the federal, as opposed to state, interests involved.[51] Congress has granted control over interstate bank acquisitions to the states through the Douglas Amendment, clearly expressing its intention to withdraw from the field and leave to each state's competence the task of defining the extent to which such acquisitions will be permitted within its borders.[52] Although, federal presence obviously remains in other aspects of interstate bank regulation, the agency charged with implementing national banking policy has construed the Douglas Amendment as a grant to the states of "plenary power to regulate entry of out-of-state bank holding companies" and "a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies." Pet. App. A52. Such a renunciation of interest precludes a finding that a state statute within the literal terms of the Douglas Amendment poses any threat to the supremacy of Federal power that the Compact Clause seeks to safeguard.

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recognizes that congressional withdrawal from the field of interstate bank acquisitions eliminates, for now, any "just supremacy" concern.

[51] The application of these principles to the compact at issue in *Multistate*, 434 U.S. at 472-78, illustrates the manner in which this Court has tested state cooperation for evidence of interference with Congressional power. The Court proceeded from the assumption that under the Commerce Clause the states, individually, could properly tax multistate business operations and searched the compact for evidence that the states, jointly, were overstepping these established bounds. Finding no evidence of such enhanced "state power *quoad* the National Government," *id.* at 473, the Court upheld the compact. *Id.* at 479. The *Multistate* decision thus adopts a Compact Clause analysis that tests joint state regulatory initiatives for evidence of conflict with the federal commerce and other powers.

[52] Congress undoubtedly has authority to reverse its decision and to regulate all aspects of interstate banking acquisitions, displacing state authority. *Cf. Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1856).

Petitioners recognize the significance of this renunciation of federal interest in interstate bank acquisitions but claim that the Douglas Amendment does not save the challenged statutes because it does not explicitly contemplate, and thus consent to, regional banking districts.[53] Such a claim misconceives the nature of the *Virginia v. Tennessee* test, which authorizes state cooperation in the absence of any congressional consent so long as the resulting combination does not encroach upon just supremacy. Under a proper analysis, the Douglas Amendment need not operate as explicit consent to any interstate compact.[54] Rather, its renunciation of federal interest

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[53] Petitioners mistakenly cite this Court's decision in *United States v. Public Utils. Comm'n*, 345 U.S. 295, 309 n.16 (1953), for the proposition that where a Congressional statute delegates power to a single host "State," this Court has followed a rule of construction that forbids cooperative state action. The footnote Petitioners cite refers to a lower court decision rejecting the claim that Congress had intended to permit states jointly to regulate interstate electricity sales. Unlike the instant case, however, the history and structure of the statute at issue there revealed congressional intent for the FPC to regulate all interstate sales, thereby foreclosing any state regulation.

[54] Congress' failure to act on requests to approve the Massachusetts and Connecticut statutes in no way suggests that, absent consent, the acts are unconstitutional. This Court has quite properly recognized that efforts may be made to obtain congressional approval, not because such approval is required but from "considerations of caution and convenience," *Multistate*, 434 U.S. at 471; and likewise, that Congress' failure to approve such attempts does not imply any disapproval of the matter under consideration. *Id.* at 458 n.8 (congressional approval sought, unsuccessfully, on 12 occasions).

Many other compacts have gone into operation after congressional approval was sought but not given. Celler, *Congress, Compacts & Interstate Authorities*, 26 Law & Cont. Prob. 682, 686 (1961) (Southern Regional Education Compact; Interstate Compact on Juveniles). Such an approach does not deprive Congress of its central role in assessing compacts for potential conflicts with its regulatory initiatives; indeed, Congress has enacted legislation specifically requiring consent to any compacts in regulatory areas where it perceives state cooperation as presenting a potential of conflict. *See* 42 U.S.C. § 2021d(a)(2)(B) (1980) (requiring explicit consent to compacts affecting low-level radioactive wacte

sharply restricts the area of undoubted federal supremacy and thus frees the states to cooperate more closely without threatening the proper balance of federal and state power.[55]

In view of Petitioners' failure to show any encroachment by the Massachusetts and Connecticut statutes on the "just supremacy" of the United States, the two state laws at issue here should be upheld.

II. CONGRESS MAY GIVE ITS CONSENT TO COMPACTS AND AGREEMENTS IN VARIOUS FORMS

Petitioner Northeast Bancorp's startling claim that "congressional approval of an interstate compact must be made explicitly and with full knowledge of its ram-

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disposal); 33 U.S.C. § 1253 (requiring consent to interstate water pollution abatement compacts).

Despite *Multistate*'s confirmation of the very limited scope of the Compact Clause as an independent constraint on cooperative state action, Congress' consent may still be sought out of an excess of caution or to avoid questions under the Commerce Clause. *Cf.* Engdahl, *supra* note 22, at 102; Zimmerman & Wendell, *Law & Use, supra* note 22, at 23. Any rule that imputes dispositive significance to congressional inaction would thus place an even greater burden on that already overworked body.

[55] Petitioners' principal effort to show an encroachment on federal supremacy under *Multistate* is to argue a conflict with the Garn-St Germain Depository Institutions Act of 1982, which provides for interstate acquisitions of failing thrifts. 12 U.S.C. § 1823(f). But it is the Douglas Amendment, not state law, that generally prohibits interstate bank acquisitions and thus would stand as an obstacle to interstate mergers between healthy and failing thrifts. Accordingly, Congress was careful to insert a provision in Garn-St Germain creating an exception to the Douglas Amendment prohibition on Federal Reserve Board approvals of interstate mergers and acquisitions, and specifically preempting any conflicting law, state or federal. 12 U.S.C. § 1823(f)(4)(i). This preemption provision itself evidences Congress' awareness of the varying state exercises of Douglas Amendment power and a willingness to preserve such laws, except to the extent they conflict with federal efforts to rescue failing thrifts. In view of these provisions, the FDIC has ample power to arrange mergers without regard to the provisions of state law, and the Connecticut and Massachusetts statutes cannot undermine this federal policy.

ifications," Northeast Bancorp Brief at 38, calls for refutation. This Court has recently reaffirmed that

> Congress may consent to an interstate compact by authorizing joint state action *in advance or by giving express or implied approval* to an agreement the States have already joined.

Cuyler v. Adams, 449 U.S. 433, 441 (1981) (emphasis added).[56] Congress has exercised its power of blanket advance consent on numerous occasions, and very broadly. In 1934, for example, Congress authorized any two or more states to make compacts for the general purpose of crime prevention and aiding in the enforcement of their criminal laws.[57] Pursuant to this very broad and general authorization, years later states subscribed to the Interstate Agreement on Detainers (initially drafted in 1956), the Interstate Compact on Juveniles (initial state adoption in 1955), and the New England Corrections Compact (initial state adoption in 1960).[58]

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[56] *Accord Virginia v. Tennessee*, 148 U.S. 521 (1893) (upholding implied consent to boundary compact); *see North Carolina v. Tennessee*, 235 U.S. 1, 15-16 (1914); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 86-87 (1823). *See also* Zimmerman & Wendell, *Law & Use*, *supra* note 22, at 21.

[57] 48 Stat. 909 (1934), *codified at*, 4 U.S.C. § 112.

[58] *See* Council, *Interstate Compacts*, *supra* note 22, at 7-8. Similar advance approvals for state compacts have been given with respect to the construction of bridges, General Bridge Act of 1946, 60 Stat. 847 (1946), and for encouraging highway safety. *See* Act of Aug. 20, 1958, Pub. L. No. 85-684, 72 Stat. 635, *as amended*, Act of Aug. 20, 1964, Pub. L. No. 88-466, 78 Stat. 564. Pursuant to the latter, states have widely subscribed to the Driver License Compact, the Nonresident Violator Compact of 1977 and the Vehicle Equipment Safety Compact. *See generally* Council, *Interstate Compacts*, *supra* note 22, at 13-24. *See also Deveau v. Braisted*, 363 U.S. 144, 154 (1960) (Congress, in approving New York-New Jersey Waterfront Compact, expressly consented to implementing legislation to be subsequently adopted by the participating states). *See* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in* Interstate Adjustments, 34 Yale L.J. 685, Appendix A (1925) (advance approval given as early as 1861).

This varied congressional practice [59] itself refutes Petitioner's suggestion that Congress must act formally and specifically with respect to each individual compact in order to afford sister states a congressional forum in which to raise objections to proposed agreements or compacts. Any interests of sister states injured by state legislation pursuant to implicit or advance consents under the Compact Clause may be brought to Congress' attention, and remedied through Congress' broad constitutional powers. *Cf. Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1856) (Congress does not restrict its own powers under Interstate Commerce Clause by consenting to a compact).[60]

This case presents no occasion to consider the degree or form of consent required to sustain a compact or agreement under the Compact Clause, or to revisit the rule that the consent need not take any specific form and may be given in advance or arise by implication. For, as shown in earlier sections, the reciprocal statutes of Massachusetts and Connecticut are not in fact an agreement or compact to exclude other states, and do not enhance the political power of those states or other New England states. Most important, they do not encroach upon the "just supremacy" of the United States in view

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[59] The exact nature of Congress' formal approval of state compacts and agreements has varied as well. *See* The Constitution of the United States of America: Analyses and Interpretations, S. Doc. No. 82, 92d Cong., 2d Sess. 421-22 (1973). In one instance, at least, Congress gave approval in advance to compacts filed with both Houses, subject to a power within 60 days to disapprove. Celler, *supra* note 54, at 686-87 (discussing Civil Defense Act of 1951). The willingness of past courts and congresses to view the consent requirement with flexibility is consistent with the fundamental purpose of the clause—to protect the political supremacy of the United States.

[60] *See also Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962) (Congress has "abundant authority to supervise and regulate the activities of operational compacts in such a way as to ensure that no violence is done by these compacts to more compelling federal concerns.").

of the federal renunciation of interest in controlling state policies with respect to interstate bank acquisitions found in the Douglas Amendment to the Bank Holding Company Act.

CONCLUSION

For all these reasons, the judgment and decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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